

NATIONAL MEDIATION BOARD**29 CFR Part 1208****Docket No. C-7156****RIN 3140-AA00****Access to Information**

AGENCY: National Mediation Board

ACTION: Proposed rule with request for comments; notice of hearing.

SUMMARY: The National Mediation Board (NMB or Board) proposes to revise its Freedom of Information Act (FOIA) regulations in order to implement the FOIA Improvement Act of 2016 and to amend its regulations regarding responding to subpoenas. The NMB also proposes to update these regulations where needed in accordance with Department of Justice guidance, Executive Order 12,600, and changes in Agency practice and procedure.

DATES: Submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The NMB will hold a public hearing on Thursday, December 8, 2016. Submit requests to speak at the hearing until 4 p.m. EST on Thursday, December 1, 2016.

ADDRESSES: You may submit comments by any of the methods listed below. Please submit requests to speak and materials for the public hearing only to the NMB's physical or e-mail address. Clearly identify all submissions by Docket Number C-7156.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web Site: www.nmb.gov. Follow the instructions for submitting comments.
- E-mail: legal@nmb.gov. Include docket number in the subject line of the message.
- Fax: (202) 692-5085.

· Mail and Hand Delivery: National Mediation Board, 1301 K Street NW, Suite 250E, Washington, DC, 20005.

See SUPPLEMENTARY INFORMATION for other information about electronic submission.

FOR FURTHER INFORMATION CONTACT: Mary Johnson, General Counsel, National Mediation Board, 202-692-5050, legal@nmb.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

II. Section-by-Section Analysis

III. Public Hearing under Railway Labor Act

IV. Procedural Requirements

I. Introduction

The NMB proposes revisions to all seven sections of part 1208 entitled “Availability of Information.”

Most of these revisions implement the FOIA Improvement Act of 2016 (Pub. L. No. 114-185). In addition, section 1208.7 proposes “Touhy” regulations to address the NMB’s response to subpoenas and other formal requests for information. Other proposed changes reflect current NMB practice and procedures. In drafting proposed changes, the NMB consulted Guidance for Agency FOIA Regulations issued by the Department of Justice’s Office for Information Policy (OIP).

The Board invites commenters to address any matters they consider relevant to the changes in the regulations. The NMB may incorporate any comments in a Final Rule. All submissions must include the agency name and docket number. All comments received will be posted without change to www.nmb.gov, including any personal information provided. For access to the docket or to read background documents or comments received, go to www.nmb.gov.

II. Section-by-Section Analysis

1208.1 General provisions

Current sections 1208.1 “Purpose” and 1208.3 “General Policy” have been combined into this proposed section. Proposed section 1208.1(c) includes the requirement in the FOIA Improvement Act of 2016 that an agency must release information unless it “reasonably foresees that disclosure would harm an interest protected by an exemption.” Proposed section 1208.1(d) has been added to specify that the NMB will preserve all correspondence related to FOIA requests until destruction or other disposition is authorized pursuant to Title 44 of the United States Code or under General Records Schedule 14 of the National Archives and Records Administration.

1208.2 Requests for records or information under the Freedom of Information Act.

Proposed section 1208.2(a) generally updates procedures for requesting documents under the FOIA, including providing updated Agency contact information. Several existing paragraphs will be renumbered to accommodate new provisions described here.

Proposed section 1208.2(a)(2) provides requesters with the option to contact the NMB’s FOIA Public Liaison for assistance in formulating a request.

Proposed section 1208.2(b) generally updates procedures related to the NMB’s processing of FOIA requests. The FOIA allows agencies to toll the 20-day response period one time to request information from the requester or to clarify a fee issue. 5 U.S.C. 552(a)(6)(A). This procedure has been expressly added to proposed section 1208.2(b)(1).

The FOIA Improvement Act of 2016 requires agencies to notify requesters of their right to engage in dispute resolution services from the Office of Government Information Services. Proposed section 1208.2(b)(2) requires the NMB to notify a requester of this right whenever the NMB requests an extension of longer than 10 days to respond to a request. Proposed section 1208.2(b)(6)(iii) includes the

requirement that the NMB notify the requester of this right whenever a FOIA request is not granted in full.

Proposed section 1208.2(b)(4) includes procedures that the NMB follows when it receives a request for records that originated at another agency or contain information of interest to another agency, in accordance with prior guidance from the OIP. The NMB currently follows these procedures, but they are not included in current regulations.

Proposed section 1208.2(b)(5) relates to requests for confidential business information provided to the NMB that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

Executive Order 12,600 requires agencies to notify submitters of confidential business information when such information is the subject of a FOIA request. Proposed sections 1208.2(b)(5)(i) through (ii) describe the procedure for notifying submitters of the request and allowing an opportunity to object to disclosure. Proposed section 1208.2(b)(5)(iv) requires submitters of confidential business information to use a good faith effort to designate information they consider protected by Exemption 4.

Proposed section 1208.2(c) extends the time to appeal from 30 days to 90 days when a request for records has been denied in whole or part. This change is required by the FOIA Improvement Act of 2016.

1208.3 Proactive disclosure of information

The NMB proposes to replace current section 1208.3 with provisions related to the proactive disclosure of information as required by the FOIA Improvement Act of 2016. Among the provisions related to proactive disclosure is the “rule of three” requirement. This proposed section requires the NMB to post on its website any materials released in response to a FOIA request and for which the NMB has received at least three requests or which the NMB determines are likely to become the subject of subsequent requests.

1208.4 Material relating to representation function

Proposed section 1208.4(b) discusses which materials related to the NMB's representation function are generally available and which remain confidential and not available for release. Proposed section 1208.4(b) clarifies that evidence submitted in connection with the showing of interest in a representation dispute will be treated as confidential.

1208.5 Material relating to mediation function

Proposed section 1208.5 describes which material related to the NMB's mediation function is confidential, clarifying and updating language in the current section 1208.5.

1208.6 Fees under the Freedom of Information Act

Proposed section 1208.6 has been redrafted based on Guidance for Agency FOIA Regulations issued by the OIP. Most provisions remain the same while the language has been streamlined and updated.

Proposed section 1208.6(d)(2) would prohibit the NMB from charging fees when it has failed to comply with the FOIA's time limits for responding to requests, except in limited circumstances. This change is required by the FOIA Improvement Act of 2016.

1208.7 Subpoenas and other requests for testimony and production of documents in legal proceedings where the NMB is not a party.

The NMB has on occasion received formal demands or subpoenas to produce records, information, or testimony in judicial, legislative, or administrative proceedings in which it or the United States is not a party. Many federal agencies have issued regulations to address these requests and provide a process for evaluating and responding to such requests. The United States Supreme Court has upheld this type of regulation in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). The NMB has never before

issued a regulation governing the submission, evaluation, and processing of subpoenas and other similar demands for information. Proposed section 1208.7 would replace current rule 1208.7 addressing compliance with subpoenas. This proposed rule would prohibit NMB employees from producing records, information, or testimony in response to demands, unless those demands are submitted in accordance with the provisions in proposed section 1208.7(a) and release has been authorized by the NMB's General Counsel. Proposed section 1208.7(c) describes the factors the General Counsel will consider in determining whether to release information.

III. Public Hearing

Pursuant to provisions in the Railway Labor Act, the NMB will hold an open public hearing on Thursday, December 8, 2016 from 10 a.m. until 12 p.m. The public hearing will be held in the Agency's offices at 1301 K Street NW, Suite 250E, Washington, DC, 20005. The purpose of the hearing will be to solicit views of interested persons concerning the proposed rule changes.

Individuals desiring to attend the meeting must notify the NMB at the above listed physical or e-mail address by the deadline posted. If the individual desires to make a presentation to the Board at the meeting, he or she is required to submit a brief outline of the presentation when making the request. In addition, a full written statement must be submitted no later than 4 p.m. on Monday, December 5, 2016. In lieu of making an oral presentation, individuals may submit a written statement for the record.

To attend the meeting, all potential attendees must include in their request: (1) their full name and (2) organizational affiliation (if any). Attendees are reminded to bring a photo identification card with them to the public meeting in order to gain admittance to the building.

IV. Procedural Requirements

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The NMB certifies that this rule will not have a significant impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The proposed rule imposes no requirements upon carriers or derivative carriers subject to the RLA. The proposed rule would not directly affect any entities that are small businesses under the Regulatory Flexibility Act. Accordingly, the National Mediation Board certifies that it will not have a significant impact on a substantial number of small entities.

National Environmental Policy Act

This proposal will not have any significant impact on the quality of the human environment under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

List of Subjects in 29 CFR part 1208

Information, Confidential business information, Freedom of Information.

For the reasons stated in the preamble, the National Mediation Board proposes to revise 29 CFR part 1208 to read as follows:

PART 1208—AVAILABILITY OF INFORMATION

Sec.

1208.1 General provisions.

1208.2 Requests for records or information under the Freedom of Information Act.

1208.3 Proactive disclosure of information.

1208.4 Material relating to representation function.

1208.5 Material relating to mediation function.

1208.6 Fees under the Freedom of Information Act.

1208.7 Subpoenas and other requests for testimony and production of documents in legal proceedings where the NMB is not a party.

AUTHORITY: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

§ 1208.1 General provisions.

(a) The purpose of this part is to set forth the regulations of the NMB regarding the availability and disclosure of information in its possession and to implement the Freedom of Information Act (FOIA). These regulations establish procedures for requesting access to records maintained by the NMB and should be read together with the FOIA, the 1987 Office of Management and Budget Guidelines for FOIA Fees, Executive Order 12,600, and the NMB's other rules and regulations.

(b) Public policy and the successful effectuation of the NMB's mission require that Board members and the employees of the NMB maintain a reputation for impartiality and integrity. Labor and management and other interested parties participating in mediation efforts must have assurance, as must labor organizations, carriers, and individuals involved in questions of representation, that confidential information disclosed to Board members and employees of the NMB will not be divulged, voluntarily or by compulsion.

(c) Notwithstanding this general policy, the Board will under all circumstances endeavor to make public as much information as can be allowed. The Board will withhold information under the FOIA only if it reasonably foresees that disclosure would harm an interest protected by one of the exemptions described in the FOIA or when disclosure is prohibited by law. When full disclosure is not possible, the

NMB will consider whether partial disclosure of information is possible and will take necessary steps to segregate and release nonexempt information.

(d) The NMB will preserve all correspondence pertaining to requests it receives under the FOIA, as well as copies of all requested records, until disposition or destruction is authorized pursuant to Title 44 of the United States Code or the General Records Schedule 14 of the National Archives and Records Administration. The NMB will not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 1208.2 Requests for records or information under the Freedom of Information Act.

(a) *Requests for records.* (1) All requests for NMB records shall be filed in writing by emailing FOIA@nmb.gov or mailing the request to the Chief FOIA Officer, National Mediation Board, 1301 K Street NW, Suite 250E, Washington, DC, 20005. Additional information about submitting requests is available at www.nmb.gov. Requesters must provide contact information, such as their phone number, email address, and/or mailing address, to assist in communications about the request.

(2) The request shall reasonably describe the records being sought in a manner which permits identification and location of the records. To the extent possible, requesters should include specific information that may help the NMB identify the requested records, such as the date, title or name, author, recipient, subject matter, case or file number, or reference number. Before submitting a request, a requester may contact the NMB's FOIA Public Liaison to discuss the records sought or to receive assistance in describing the records.

(3) The request shall include any request for waiver of fees, clearly outlining the reasons for any such request.

(4) Requests may specify the preferred form or format (including electronic formats) for the records sought. The NMB will accommodate such requests if the record is readily reproducible in that form or format.

(5) Upon receipt of a request for the records, the Chief FOIA Officer shall assign the request a FOIA tracking number and record the date and time received, the name and address of the requester, and the nature of the records requested. If the request will take more than 10 working days to process, the Chief FOIA Officer will acknowledge the request in writing, providing the requester with an individualized tracking number and a brief description of records sought.

(6) All time limitations established pursuant to this section with respect to processing initial requests and appeals shall commence at the time a written request for records is received at the Board's offices in Washington, D. C. or via email.

(b) Processing the request. (1) Time limits. Within 20 working days after a request for records is received, the Chief FOIA Officer shall determine whether to comply with the request and immediately notify the requester, unless an extension is taken under paragraph (b)(2) of this section. The NMB may make one request for additional information from the requester or clarify a fee issue with the requester and may toll the 20-day period while awaiting receipt of the additional information.

(2) Extension of time. In unusual circumstances as specified in this paragraph, the Chief FOIA Officer may extend the time for initial determination on requests up to a total of 10 days (excluding Saturdays, Sundays, and legal public holidays). Extensions shall be made by written notice to the requester within 20 working days of receipt of the request and shall set forth the reason for the extension, provide the date on which a determination is expected to be dispatched, and make available the NMB's Public Liaison to assist with any disputes between the requester and the NMB. Where the extension exceeds 10 working days, the Chief FOIA Officer will notify the requester of the right to seek dispute resolution

services from the Office of Government Information Services. As used in this paragraph “unusual circumstances” means, but only to the extent necessary to the proper processing of the request:

(i) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(ii) The need for consultation, according to the procedures set forth in paragraph (b)(4), with another agency having substantial interest in the determination of the request.

(3) *Expedited processing.* The Chief FOIA Officer shall process a request on an expedited basis whenever a requester demonstrates a compelling need. A request for expedited processing may be made at any time.

(i) For purposes of this section, “compelling need” means that a failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual or, with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(ii) The Chief FOIA Officer shall make a determination of whether to provide expedited processing, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request.

(4) *Consultations and referrals.*

(i) When the NMB receives a request for a record (or a portion thereof) in its possession that originated with another federal agency, the Chief FOIA Officer shall refer the request and record to that agency for direct response to the requester. The Chief FOIA Officer will notify the requester of any referral and

provide the requester with the name and FOIA contact information of the agency to which the request was referred.

(ii) In instances where a record is requested that originated with the NMB and another federal agency has a significant interest in the record (or a portion thereof), the NMB shall consult with that federal agency before responding to a requester.

(iii) All consultations and referrals received by the NMB will receive a tracking number and be processed according to the date that the first agency received the request.

(5) *Requests for business information provided to the NMB.* Business information is financial or commercial information obtained by the NMB from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(i) When the NMB has reason to believe that requested information may fall under Exemption 4, it will promptly provide written notice to the submitter. The notice will either describe the requested business information or include a copy of the requested records. The NMB shall provide the submitter with seven days (excepting Saturdays, Sunday, and legal public holidays) to provide a statement of any objection to disclosure.

(ii) The NMB will consider the submitter's objections in deciding whether to disclose business information. If the NMB decides to disclose business information over such objection, it shall provide written notice to the submitter of its reasons for not sustaining the objections, a description of information to be disclosed, and the disclosure date.

(iii) Whenever the NMB provides a submitter with notice and the opportunity to object under paragraph (b)(5)(ii) of this section, it shall also inform the requestor that the request is being processed according to these provisions and there may be a subsequent delay in processing.

(iv) A submitter of confidential business information must use good faith efforts to designate any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(6) *Response to requests.* Within 20 days (excepting Saturdays, Sunday, and legal public holidays) after the receipt of a request, the requester shall be notified of the determination and the right to seek assistance from the NMB's FOIA Public Liaison. If the request for records is not granted in full, the final response letter shall also include:

(i) A reference to the specific exemption or exemptions under the FOIA authorizing the withholding of the record or parts of the record and a brief explanation of how the exemption applies to the record withheld.

(ii) A statement that the denial may be appealed within 90 days by writing to the Chairman, by emailing FOIA@nmb.gov, or by writing to National Mediation Board, 1301 K Street NW, Suite 250E, Washington, DC, 20005, and that judicial review will thereafter be available in the district in which the requester resides, or has his principal place of business, or the district in which Agency records are situated, or the District of Columbia.

(iii) A notification of the right to seek dispute resolution services from the Office of Government Information Services.

(7) *Treatment of delay as a denial.* If no determination has been dispatched at the end of the 20-day period, or the last extension thereof, the requester may deem the request denied, and exercise a right of appeal, in accordance with paragraph (c) of this section. When no determination can be dispatched within the applicable time limit, the Chief FOIA Officer shall continue to process the request and shall inform the requester of the reason for the delay, the date on which a determination may be expected to

be dispatched, and of the right to treat the delay as a denial and to appeal to the Chairman of the Board in accordance with paragraph (c) of this section.

(c) Appeals to the Chairman of the Board. (1) When a request for records has been denied in whole or in part by the Chief FOIA Officer or other person authorized to deny requests, the requester may, within 90 days of its receipt, appeal the denial to the Chairman of the Board. Appeals to the Chairman shall be in writing, addressed to the Chairman, National Mediation Board, Washington, DC 20005 or emailed to FOIA@nmb.gov.

(2) The Chairman of the Board will act upon the appeal within 20 working days (excluding Saturdays, Sundays and legal public holidays) of its receipt unless an extension is made under paragraph (c)(3) of this section.

(3) In unusual circumstances as defined in paragraph (b)(2) of this section, the time for action on an appeal may be extended up to 10 days (excluding Saturdays, Sundays and legal public holidays). Written notice of such extension shall be made prior to the expiration of the 20-day response period, setting forth the reason for the extension and the date on which a determination is expected to be dispatched.

(4) If no determination on the appeal has been dispatched at the end of the 20-day period or the last extension thereof, the requester is deemed to have exhausted administrative remedies, giving rise to a right of review in a district court of the United States, as specified in 5 U.S.C. 552(a)(4). When no determination can be dispatched within the applicable time limit, the appeal will nevertheless continue to be processed; on expiration of the time limit the requester shall be informed of the reason for the delay, of the date on which a determination may be expected to be dispatched, and of a right to seek judicial review in the United States district court in the district in which they reside or have their principal place of business, the district in which the Board records are situated or the District of Columbia. The requester may be asked to forego judicial review until determination of the appeal.

§ 1208.3 Proactive disclosure of information.

The NMB shall, in conformance with 5 U.S.C. 552(a)(2), maintain and make available for public inspection, by posting on its website (unless the Board determines by order published in the Federal Register that such publication would be unnecessary or impracticable) the following information: final opinions, including concurring and dissenting opinions made in representation cases; statements of policy and interpretation made by the NMB but not published in the Federal Register; administrative staff materials, such as the Representation Manual; frequently requested materials, defined as those released in response to a FOIA request and for which the Agency has received at least three requests or those records that because of the nature of their subject matter the Agency determines are likely to become the subject of subsequent requests; and a general index of records available under this section.

§ 1208.4 Material relating to representation function.

(a) The documents constituting the record of a case, such as the notices of hearing, motions, rulings, findings upon investigation, determinations of craft or class, dismissals, withdrawals, and certifications, are matters of official record and shall be made available on the NMB's website.

(b) This part notwithstanding, the NMB will treat as confidential evidence submitted in connection with the showing of interest in a representation dispute, including authorization cards and signature samples, and other personally identifying information received during an investigation.

§ 1208.5 Material relating to mediation function.

All files, reports, letters, memoranda, and documents relating to the mediation function of the NMB, with the exception of procedural or administrative materials, such as applications, docket letters, or public meeting notices, in the custody of the NMB or its employees relating to or acquired in their mediatory capacity under the Railway Labor Act are hereby declared to be confidential. No such

confidential documents or the material contained therein shall be disclosed to any unauthorized person, or be taken or withdrawn, copied or removed from the custody of the NMB or its employees by any person or by any agent of such person or their representative without the explicit consent of the NMB.

§1208.6 Fees under the Freedom of Information Act.

(a) *In general.* The NMB will charge for processing requests under the FOIA in accordance with the provisions of this section and with Office of Management and Budget Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters: (1) commercial use requesters, (2) non-commercial scientific or educational institutions or news media requesters, and (3) all other requesters. Different fees are assessed depending on the category. Requesters may seek a fee waiver. The NMB will consider requests for fee waivers in accordance with the requirements in paragraph (k) of this section. To resolve any fee issues that arise under this section, the NMB may contact a requester for additional information. The NMB ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the United States Treasury.

(b) *Definitions.* For purposes of this section:

Commercial use request is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. An agency's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information. The NMB will notify requesters of their placement in this category.

Direct costs are those expenses that an agency incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (i.e., the basic rate of pay for the

employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

Duplication is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

Educational institution is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. Agencies may seek verification from the requester that the request is in furtherance of scholarly research, and agencies will advise requesters of their placement in this category.

Noncommercial scientific institution is an institution that is not operated on a “commercial” basis, as defined in this paragraph (b) and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use. The NMB will advise requesters of their placement in this category.

Representative of the news media is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast “news” to the public at large and publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-

dissemination function of the requester will not be considered to be for a commercial use. “Freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, agencies can also consider a requester’s past publication record in making this determination. The NMB will advise requesters of their placement in this category.

Review is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential business information submitter under section 1208.2(b)(5), but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

Search is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, the NMB will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, the NMB will not add any additional costs to charges calculated under this section. (1) *Search.*

(i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. The NMB will charge search fees for all other

requesters, subject to the restrictions of paragraph (d) of this section. The NMB may properly charge for time spent searching even if it does not locate any responsive records or determines that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, direct costs will be charged.

(iii) The NMB will also charge direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. The NMB will notify the requester of the costs associated with creating such a program, and the requester must agree to pay the associated costs before the costs may be incurred.

(2) *Duplication.* The NMB will charge duplication fees to all requesters, subject to the restrictions of paragraph (d) of this section. The NMB will honor a requester's preference for receiving a record in a particular form or format where it can readily reproduce it in the form or format requested. Where photocopies are supplied, the NMB will provide one copy per request at the cost of 15 cents per page. For copies of records produced on tapes, disks, or other media, the NMB will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, the NMB will charge the direct costs.

(3) *Review.* The NMB will charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, i.e., the review conducted by the NMB to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated

with the re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees.* (1) When the NMB determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, it will not charge search fees.

(2)(i) If the NMB fails to comply with the time limits described in section 1208.2(b)(1) in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraph (d)(2)(ii) through (iv) of this section.

(ii) If the NMB has determined that unusual circumstances as defined in section 1208.2(b)(2) apply and the NMB provided timely written notice to the requester in accordance with that section, a failure to comply with the time limit shall be excused for an additional 10 days.

(iii) If the NMB has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the NMB may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are taken. The NMB must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and must have discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the NMB may charge all applicable fees incurred in the processing of the request.

(iv) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, the NMB will provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25.

(e) Notice of anticipated fees in excess of \$25.00. (1) When the NMB determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the Agency must notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the NMB will advise the requester accordingly. If the request is not for noncommercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) If the NMB notifies the requester that the actual or estimated fees are in excess of \$25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or

designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. The NMB is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the NMB estimates that the total fee will exceed that amount, it will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The NMB will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) The NMB will make available its FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Although not required to provide special services, if the NMB chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Charging interest.* The NMB may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the Agency. The NMB will follow the provisions of the Debt Collection Act of 1982 (Public Law 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) *Aggregating requests.* When the NMB reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, it may aggregate those requests and charge accordingly. The NMB may presume that

multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, the NMB will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters cannot be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraphs (i)(2) or (i)(3) of this section, the NMB will not require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (i.e., payment before copies are sent to a requester) is not an advance payment.

(2) When the NMB determines or estimates that a total fee to be charged under this section will exceed \$250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. The NMB may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee within 30 calendar days of the billing date, the NMB may require that the requester pay the full amount due, plus any applicable interest on that prior request, and it may require that the requester make an advance payment of the full amount of any anticipated fee before beginning to process a new request or continuing to process a pending request or any pending appeal. Where the NMB has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which the NMB requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does

not pay the advance payment within 30 calendar days after the date of the fee determination, the request will be closed.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires the NMB to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the NMB must inform the requester of the contact information for that program.

(k) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) The NMB will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (k)(2)(i) through (iii) of this section are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. Agencies will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, agencies will consider the following criteria:

(A) The NMB will identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the NMB must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. The NMB will presume that when a news media requester has satisfied the factors in paragraphs (k)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver will be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

§ 1208.7 Subpoenas and other requests for testimony and production of documents in legal proceedings where the NMB is not a party.

(a) In legal proceedings between private litigants, a subpoena or other demand for the production of records held by the Agency or for oral or written testimony of a current or former NMB employee should be addressed to the General Counsel, National Mediation Board, 1301 K Street NW, Suite 250E, Washington, DC, 20005. No other official or employee of the NMB is authorized to accept service of a demand or subpoena on behalf of the Agency.

(b) No current or former employee may produce official records or information or provide testimony in response to a demand or subpoena unless authorized by the General Counsel.

(c) The General Counsel may grant an employee permission to testify or produce official records or information in response to a demand or subpoena. In making this determination, the General Counsel shall consider whether:

- (1) Release of the requested records or testimony is prohibited under § 1208.5;
- (2) The disclosure is appropriate under the rules of procedure governing the case or matter;
- (3) The requested testimony or records are privileged under the relevant substantive law concerning privilege;
- (4) Disclosure would violate a statute or regulation;
- (5) Disclosure would reveal trade secrets without the owner's consent; and

(6) Allowing testimony or production of records would be in the best interest of the NMB or the United States.

Dated: November 3, 2016

Mary Johnson

General Counsel, National Mediation Board

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